90-763

No.

Supreme Court, U.S.
FILED
NOV 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARK T. FREY and CHRISTINE L. FREY,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALLAN B. COOPER
Counsel of Record

Ninth Floor
9401 Wilshire Boulevard
Beverly Hills, California 90212
(213) 273-6333

Attorney for Petitioners
MARK T. FREY and CHRISTINE L. FREY

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

QUESTIONS PRESENTED

1. Whether 26 U.S.C. § 6321 by its terms allows the Internal Revenue Service ("I.R.S.") to recoup, under threat of levy and foreclosure, from these petitioners — who purchased property subject to a tax lien recorded against their seller/taxpayer without knowing of the lien — an amount greater than the value of the taxpayer's interest in the property at the time of the sale to petitioners.

2. If the first question is answered in the affirmative, whether the Fifth Amendment nonetheless precludes the I.R.S. from recouping from petitioners more than it could have recouped from the delinquent taxpayer at the time of the sale.

PARTIES TO PROCEEDINGS BELOW

1. Reverend Mark T. Frey
   Christine L. Frey
   950 East Glen Drive
   La Verne, California 91750

2. Commonwealth Land Title Insurance Company
   2049 Century Park East
   Suite 1070
   Los Angeles, California 90067

Commonwealth is a member of the Reliance Group of Insurance Companies. Its ultimate parent is Reliance Group Holdings Inc., and its immediate parent is State Title Insurance Company. Intermediate parents include Reliance Insurance Company, Reliance Financial Services Corporation, and Reliance Group, Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

REPORTED OPINIONS 1

JURISDICTIONAL STATEMENT 1

PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 5

1. 26 U.S.C. § 6321 Does Not Allow the I.R.S. to Recoup from Petitioners, Under Threat of Levy and Foreclosure, an Amount Greater than the Value of Feliciano's Interest in the Property at the Time of Sale 5

2. The Fifth Amendment Precludes Allowing the I.R.S. to Recoup More from Petitioners than from Feliciano 8

CONCLUSION 9

Page

LIST OF APPENDICES

APPENDIX A

MEMORANDUM OPINION, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 13, 1990 . . . . . A1

APPENDIX B

ORDER GRANTING DEFENDANT'S AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED APRIL 10, 1989 . . . . . B1

APPENDIX C

SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, FILED APRIL 18, 1989 . . . . . C1

TABLE OF AUTHORITIES

Page

Cases

Aquilino v. U.S.
363 U.S. 509, 80 S.Ct. 1277 (1960) 7

Hohn v. Riverside County Flood Control
& Water Conservation District
228 Cal.App.2d 605,
39 Cal.Rptr. 647 (1964) 7

United States v. Rogers
461 U.S. 677, 103 S.Ct. 2132 (1983). 6, 7

Constitution

United States Constitution
Fifth Amendment 2, 5, 8

Statutes

26 U.S.C. § 6321 . . . . . .2, 5-7
26 U.S.C. § 6325(b)(2)(A) 8
26 U.S.C. § 7426(a) 4
26 U.S.C. § 7426(b)(1) 4
28 U.S.C. § 1254(1) 1

Rule

United States Supreme Court Rules
Rule 10(c) 1

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MARK T. FREY and CHRISTINE L. FREY,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

REPORTED OPINIONS

There are no reported opinions previously delivered in this case. The opinion of the Ninth Circuit, Appendix A attached hereto, was not certified for publication.

JURISDICTIONAL STATEMENT

This petition seeks review of the judgment of the Court of Appeals for the Ninth Circuit, which judgment was filed on August 13, 1990. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1). Petitioners respectfully submit that, for the reasons set forth below in argument, review is appropriate particularly in light of Rule 10(c) of the Rules of the United States Supreme Court

(important question of federal law which has not been, but should be, settled by this Court).

PROVISIONS INVOLVED

U.S. Constitution, amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [*sic*] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 6321:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT OF THE CASE

On May 22, 1987, petitioners herein — Reverend Mark T. Frey and his wife Christine — purchased their first home, in La Verne, California ("the property") from Patricia Feliciano. Petitioners paid the then-fair market value for the home, and were to receive — and understood and believed that they were in fact receiving — title free and clear of all liens and encumbrances except the purchase-money deed of trust which they had executed in connection with their purchase.

Of the proceeds paid by petitioners, only approximately $3,000 went to Mrs. Feliciano. The remainder (after closing costs) went to pay off prior encumbrances placed on the property by Mrs. Feliciano and her ex-husband: a June 1976 deed of trust, a November 1984 deed of trust, and a tax lien recorded against the Felicianos by the State of California.

Unbeknownst to petitioners, however, in March of 1986, a federal tax lien was recorded against the Felicianos. *It is undisputed that the federal tax lien was junior in priority to the 1976 deed of trust, the 1984 deed of trust, and the state tax lien.*

In May of 1986, respondent United States of America, through the Internal Revenue Service (hereinafter respondent will be referred to as "the I.R.S.") levied on the property in execution of its fourth-position lien. Mrs. Feliciano filed a Chapter 7 bankruptcy proceeding, which automatically stayed the enforcement proceedings. However, the two senior trust deed holders obtained relief from the automatic stay and were proceeding with foreclosure proceedings.

In February of 1987, an escrow for the sale to petitioners was opened pursuant to which, as previously

noted, petitioners were to receive title free and clear. In March of 1987, Mrs. Feliciano sought to remove the tax lien so she could sell the home and avoid foreclosure (which would have wiped out the tax lien vis-a-vis the property). She met with the I.R.S. and signed a document which she believed would result in release of the lien with respect to the property. Instead, the I.R.S. only released the *levy*, not the lien.

As previously noted, however, petitioners had no actual knowledge of the I.R.S. lien at all. Consequently, they simply closed escrow according to its terms, believing they were receiving clear title. Nine months later — in February of 1988 — the I.R.S. issued a new levy against the Felicianos and filed a Notice of Seizure against the property by then owned by petitioners. By that time, amount of the I.R.S. lien was more than the gross value of the property.

Petitioners filed suit for wrongful levy and injunctive relief in the United States District Court for the Central District of California. Jurisdiction in that court was conferred by 26 U.S.C. §§ 7426(a), (b)(1). As it relates to this petition, petitioners' position was that the I.R.S. could recoup through enforcement of its lien against the property no more from petitioners than it could have recouped from Mrs. Feliciano — namely, the $3,000 she received over and above the liens which were paid off and to which the I.R.S. lien was concededly subordinate. The position of the I.R.S., however, was that because the senior liens had been paid off by petitioners, its lien had now risen to first position, and it therefore was entitled to a windfall — the entire value of the property — not from the delinquent taxpayers, but from petitioners.

Amazingly, this unjust enrichment was sanctioned by the district court (which granted summary judgment in favor of the I.R.S.; see Appendices B, C attached hereto)

and by the Court of Appeals for the Ninth Circuit, which affirmed. By this petition, petitioners ask this Court to settle this important question of law, namely, whether the Internal Revenue Code does, or even can consistent with the Fifth Amendment, allow the I.R.S. to obtain a greater economic interest in property from a successor owner than it could have obtained from the delinquent taxpayer himself.

ARGUMENT

While this petition raises two questions — one rooted in statutory interpretation and the other in constitutional law — the issue is really the same: Can the I.R.S., through levy and execution against property formerly owned by a delinquent taxpayer, obtain a greater economic interest in the property levied upon from the new owner than it could have obtained from the delinquent taxpayer himself? Under any analysis of equity and fairness, the answer is a resounding "no." But both the district court and the court of appeals held to the contrary. Petitioners respectfully submit that such a result is so unfair, and the questions it raises so important, that review by this Court is warranted.

1. 26 U.S.C. § 6321 Does Not Allow the I.R.S. to Recoup from Petitioners, Under Threat of Levy and Foreclosure, an Amount Greater than the Value of Feliciano's Interest in the Property at the Time of Sale.

26 U.S.C. § 6321 creates a lien for unpaid taxes in favor of the I.R.S. "upon all property and rights to property, whether real or personal, belonging to [the

taxpayer]." This lien, however, is not unlimited. Rather, it is subject to two basic principles, as articulated by this Court:

> (1) The lien "cannot extend beyond the property interests held by the delinquent taxpayer." *U.S. v. Rogers*, 461 U.S. 677, 690-91, 103 S.Ct. 2132, 2141 (1983).
>
> (2) The I.R.S. "may not ultimately collect, as satisfaction for the indebtedness owed to it, more than the value of the property interests that are actually liable for that debt." *Id.*

Both of these principles make good sense. After all, I.R.S. liens are not intended to be punitive even as to the delinquent taxpayer, much less as to innocent third parties such as petitioners.

Nothing in the statute authorizes the result which obtained here — the I.R.S.'s being held entitled to receive more from petitioners than it would have received from Feliciano at the time of the sale. Viewed another way, had the I.R.S. levy and seizure not been stayed by the bankruptcy, the I.R.S. would have held a tax sale, again subject to the senior deeds of trust and state tax lien, and realized the same $3,000 that Feliciano did (if that). Under no possible set of circumstances in this case, however, could the I.R.S. have realized from the property in Feliciano's hands what it has now been allowed to realize from the property in petitioners' hands.

It is no answer to simply say, as may the I.R.S., that (a) the nature of the taxpayer's interest is determined by state law and (b) that everything else is an issue of "priority." It is true that for purposes of § 6321, this Court has held that the nature of the taxpayer's interest

is to be determined by state law. *Aquilino v. U.S.*, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 1280 (1960). In and of itself, this is a troubling concept, since it means that delinquent taxpayers — and innocent successors such as petitioners — may receive different treatment with respect to the same "property" depending on quirks of state law.

Be that as it may, however, the interest Feliciano had was a fee interest *qualified* by the state tax lien and by the transfers of title into trust, where it is retained by the trustee until the debt is satisfied or the property is sold to enforce payment. *Hohn v. Riverside County Flood Control & Water Conservation District*, 228 Cal.App.2d 605, 39 Cal.Rptr. 647 (1964). The I.R.S. took subject to those limitations (which never went away prior to the sale to petitioners) and, therefore, could never acquire greater rights to the property.

In the final analysis, however, whether the issue is one of "priority" or "interest" is beside the point. What is at stake, as *Rogers* recognized, is *economic value*. Feliciano's interest in the property had a certain economic value (gross value less encumbrances and costs of sale) which rightfully was, and should be, subject to the I.R.S. lien. The value of the interest of successors such as petitioners may, in a given case, be greater than, equal to, or less than the value of Feliciano's interest. The I.R.S. should not be prejudiced if the value of the successor's interest is less; by the same token, it should not be benefited if the value of that interest is greater. The decisions of this case have conferred such a benefit, whereas § 6321 by its terms does not. One way or the other, this Court should settle this issue.

2. The Fifth Amendment Precludes Allowing the I.R.S. to Recoup More from Petitioners than from Feliciano

The constitutional issue is admittedly one of first impression; at least, counsel for petitioners has found no case on point either way. But again, petitioners respectfully submit that the Fifth Amendment's prohibitions against takings without just compensation and deprivation of property without due process are applicable here based on notions of common sense and fundamental fairness.

Petitioners' position is simply that the Fifth Amendment does not allow the I.R.S. to take more "property" from petitioners to satisfy the debt of a delinquent taxpayer (Feliciano) than it could have taken from the taxpayer himself. To support this premise, one need only look at the alternatives which would have been available to petitioners had they known of the tax lien. Under such circumstances, they could have (a) aborted the transaction, leaving the I.R.S. whatever equity would be left in the property after a foreclosure sale by senior lienholders, or, perhaps more significantly in terms of this analysis, (b) sought to obtain a certificate of discharge pursuant to 26 U.S.C. § 6325(b)(2)(A) by paying the value of the interest of the I.R.S. in the property to be discharged — that is, by paying to the I.R.S. *Feliciano's equity in the property.* In either event, the I.R.S. would have gotten no more than the $3,000 Feliciano got on the sale.

Should a different result obtain because petitioners were ignorant of the lien? They concededly will be obligated to pay Feliciano's equity twice — once to Feliciano and once to the I.R.S. — even if they prevail in this Court. But they respectfully submit that anything more than that amounts to an unconstitutional taking of the property they have already paid fair market value for, and ask this Court to so rule.

CONCLUSION

What makes this case all the more frustrating is the fact that the I.R.S. was asked to release the lien so that a pending sale could be consummated. The I.R.S. never told Mrs. Feliciano, much less the unsuspecting Freys, that its releasing the levy was not the same as releasing the lien, that the lien still existed, and that the I.R.S. would simply relevy and try to obtain the full value of the property, not just Mrs. Feliciano's equity, from petitioners. The I.R.S. clearly knew what the score was, and took advantage of the fact that Mrs. Feliciano and petitioners obviously did not; yet the court of appeals ruled that the I.R.S. was not estopped to relevy on the property.

Petitioners respectfully submit that until the issues raised herein are clearly resolved by this Court, the I.R.S. will have the incentive to act in a similar, and similarly unconscionable, manner. Petitioners have done no wrong here. They are not the delinquent taxpayers. They are a minister and his wife who are being asked to pay twice for the same piece of property (*plus* any post-sale appreciation) under circumstances where the I.R.S. could only have obtained $3,000 from the property in the hands of the delinquent taxpayer. Petitioners therefore respectfully request that this petition be granted and that

the Court determine just what the I.R.S. is and is not entitled to once the delinquent taxpayer divests himself of property.

Respectfully submitted,

ALLAN B. COOPER

Counsel of Record
for Petitioners
MARK T. FREY and
CHRISTINE L. FREY

APPENDIX A

FILED
AUG 13 1990
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK T. FREY and
CHRISTINE L. FREY,
Plaintiffs-Appellants,

vs.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 89-55492
D.C. No. CV-88-2260-JGD

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted June 7, 1990
Pasadena, California

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: BROWNING and PREGERSON, Circuit Judges, and McKIBBEN,** District Judge

Appellants Mark and Christine Frey (the "Freys") appeal the district court's grant of summary judgment in favor of the United States. The district court held that the Internal Revenue Service ("IRS") had a legitimate tax lien on the Frey's property and that the IRS was not equitably estopped from asserting its lien rights. The court further found that the Freys could not establish priority over the tax lien under a theory of equitable subrogation. We affirm.

FACTS

Alvin and Patricia Feliciano owned real property in La Verne, California. The Felicianos encumbered the property with two deeds of trust. The State of California recorded a tax lien against the property in 1986. In March 1986, the IRS recorded a federal tax lien. Subsequently, the IRS served a notice of levy of the property upon the Felicianos. In November, Mrs. Feliciano filed a Chapter 7 bankruptcy proceeding, which automatically stayed the IRS' seizure proceedings.

On February 23, 1987, the Freys offered to purchase the property from Patricia Feliciano. An escrow was opened and a title report was prepared which disclosed the existence of the tax liens and the trust deeds. The escrow agreement provided that the sale of the property was contingent upon the seller receiving a release of the federal tax lien.

** The Honorable Howard D. McKibben, U.S. District Judge for the United States District Court of Nevada, sitting by designation.

In March, Patricia Feliciano obtained a Release of Levy from the IRS. Feliciano alleges that although she cannot remember the exact representations made by the agent present when she obtained the release, she had the impression she was receiving a release of the lien as well. IRS agent Randolph Bailey, who signed the Release of Levy, denies telling Feliciano that the IRS was releasing the lien. Bailey states the levy was released "in light of the bankruptcy petition."

On May 22, 1987, title to the property was transferred to the Freys. The Freys allege that the real estate agents told them that the property was no longer encumbered by the federal tax lien. The final title report failed to reflect the federal tax lien which was still of record. The funds from the sale of the property were used to discharge the obligations on the three senior encumbrances. Patricia Feliciano retained three thousand dollars ($3,000.00). The IRS received nothing from the sale.

Since the IRS was not notified of the sale, the property remained subject to the federal tax lien. 26 U.S.C. § 7425(b)(1) (1988). The IRS discovered that the property had been sold to the Freys on October 22, 1987. On February 22, 1988, the IRS commenced collection proceedings under the lien and served a notice of seizure of the property upon the Freys.

DISCUSSION

This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review *de novo* a district court's grant of summary judgment. *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1441 (9th Cir. 1989).

1. Wrongful Levy — The Freys contend that their property is subject to a wrongful levy since the IRS improperly released the initial levy. 26 U.S.C. § 7426

allows third parties to bring an action against the United States when property is wrongfully seized pursuant to levy by the IRS. *Arth v. United States,* 735 F.2d 1190, 1192-93 (9th Cir. 1984). To maintain an action for wrongful levy, the moving party must show that he has an interest in or a lien on such property, and the levy is wrongful. *Flores v. United States,* 551 F.2d 1169, 1171 (9th Cir. 1977). The plaintiff has the ultimate burden of proving that the levy was wrongful and should be overturned. *Morris v. United States,* 813 F.2d 343, 345 (11th Cir. 1987).

Here, the Freys have an ownership interest in the property; however, they have failed to show that the levy was wrongful. Feliciano owned the property at the time the federal tax lien arose. The Freys succeeded to Feliciano's title which was already encumbered by the tax lien. That tax lien was never removed. There is no evidence in the record of misconduct or bad faith on the part of the IRS in releasing the original levy and subsequently relevying on the property. The district court properly found the Freys failed to establish a wrongful levy.

2. Equitable Estoppel — The Freys contend the government should be estopped from asserting its lien rights because the revenue agent released the levy knowing a sale of the property was to be conducted and knowing the Felicianos had minimal equity in the property to pay the government lien. Traditional estoppel requires: 1) that the party to be estopped know the facts; 2) the party must intend that his or her conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) the latter must be so ignorant of the true facts; and 4) he must rely on the former's conduct to his injury. *United States v. Wharton,* 514 F.2d 406, 412 (9th Cir. 1975).

Two additional elements must be established to set forth a claim of estoppel against the government. First, the party seeking estoppel must establish affirmative misconduct beyond mere negligence. Second, estoppel will only apply when the government's wrongful act will cause a serious injustice and the public's interest will not suffer undue damage by imposition of the liability. *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989).

Here, there is no evidence of affirmative misconduct on the part of the government officials. The document executed by the IRS agent clearly stated it was a release of levy. The IRS agent never released the federal tax lien on the property and never told anyone that the lien was released. The tax lien remained on record throughout the negotiations and was a matter of public record at the time the escrow closed. The Freys were on notice of the federal tax lien through the information contained in the preliminary title report. Therefore, the district judge correctly ruled that the Freys were not entitled to recover under the theory of equitable estoppel.

3. Equitable Subrogation — The Freys also contend they are entitled to be equitably subrogated to the liens that were senior to the federal tax lien at the time of the sale of the property except for the three thousand dollars ($3,000.00) that Feliciano realized on the sale. The district court properly rejected this argument.

Under California law, to be equitably subrogated to the rights of a secured creditor: 1) payment must have been made by the subrogee to protect his own interest; 2) the subrogee must not have acted as a volunteer; 3) the debt paid must have been one for which the subrogee was not primarily liable; 4) the entire debt must have been paid; and 5) subrogation must not work any injustice to the rights of others. *Caito v. United*

California Bank, 20 Cal.3d 694, 576 P.2d 466, 471, 144 Cal.Rptr. 751 (1978).

Here, as in *Simon v. United States,* 756 F.2d 696 (9th Cir. 1985), the Freys were not acting to protect an existing interest nor were they paying the debt of another. The Freys paid money "solely as volunteer purchasers of property." *Fidelity Nat'l Title Ins. Co. v. United States,* No. 89-55209, slip op. (9th Cir. Jul. 2, 1990). This case is to be distinguished from those in which an owner discharges a debt owed to a senior lienholder in order to protect the owner's interest in the property. *First Am. Title Ins. Co. v. United States,* 848 F.2d 969, 972 (9th Cir. 1988). The right granted to owners who pay off debts is not a right also granted to a purchaser in a position similar to that of the Freys. *Fidelity Nat'l Title Ins.* at 4. Therefore, the Freys cannot benefit from the rights of any lienholders senior to the IRS. The district court properly concluded the Freys are not entitled to equitable subrogation, and the property remains subject to the IRS lien.

CONCLUSION

The district court's judgment in favor of the United States is AFFIRMED.

APPENDIX B

FILED
APR 10 1989
Clerk, U.S. District Court
Central District Of California
By /s/ Jn Deputy

ENTERED
APR 12 1989
Clerk, U.S. District Court
Central District Of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK T. FREY and
CHRISTINE L. FREY,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

CASE NO. CV 88-2260 JGD

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Court has carefully reviewed and considered the papers filed by the parties and the oral argument heard on April 10, 1989. Based on this consideration, the Court is compelled to GRANT defendant's motion for

summary judgment and DENY plaintiffs' motion for summary judgment.

UNDERLYING FACTS

On June 16, 1976, Alvin and Patricia Feliciano acquired title to property located at 950 East Glen Drive, La Verne, California. On December 21, 1984, a delegate of the Secretary of the Treasury lawfully assessed against the Felicianos internal revenue taxes in the amount of $187,294.66. Notice and demand for payment were made upon the Felicianos as prescribed by law. On March 13, 1986, a Notice of Federal Tax Lien was filed with the Los Angeles County Recorder's Office.

On May 8, 1986, the Internal Revenue Service (IRS) levied on the real property in La Verne, pursuant to 26 U.S.C. § 6331(a), to collect unpaid federal income taxes. On November 12, 1986, Patricia Feliciano filed a Chapter 7 petition with the United States Bankruptcy Court, Central District of California, Case No. LA 86-20649-LF, which automatically stayed any collection proceedings. *See* 11 U.S.C. § 362. On February 6, 1987, the IRS learned of Patricia Feliciano's bankruptcy filing when Sandy Priedolen, a paralegal at the law firm employed by Mrs. Feliciano for her bankruptcy, contacted Revenue Officer Randolph Bailey.

During February and March of 1987, two of the lienholders senior to the IRS, Federal National Mortgage Association and Security Pacific National Bank, moved for relief from the automatic stay to foreclose on the property for defaults under deeds of trust totaling approximately $80,000.00 There was also a third lien on the property, senior to that of the IRS, in the amount of $14,000, recorded by the State of California.

To avoid foreclosure, Mrs. Feliciano put her home up for sale. On or about February 23, 1987, an escrow was opened for the purchase of the property from Mrs. Feliciano to the Freys. In connection therewith, a title report was obtained which disclosed the existence of the $187,294.66 federal tax lien. A contingency for the sale was that title to the property be delivered clear of all monetary liens, including the federal tax lien.

On March 12, 1987, Mrs. Feliciano and Sandy Preidolin went to the IRS office. A Release of Levy was executed by Randolph Bailey and Patricia Feliciano. Mrs. Feliciano's declaration indicates that she believed that this document released the tax lien, and not just the levy. The only basis she asserts for this belief is that the agents were friendly and indicated that they felt sorry for her and that they knew she was unaware of the tax assessment against her husband, Alvin Feliciano. Declaration of Patricia Feliciano ¶¶ 7-8. Mrs. Feliciano does not assert that any IRS representative stated that the lien would be released.

On or about May 22, 1987, the Freys purchased the property. The proceeds of the sale were distributed to pay off the liens of Federal National, Security Pacific, and the State of California. Mrs. Feliciano netted approximately $3,000.00 following disbursement to these three lienholders. The IRS was not notified of the sale nor did it issue a release of federal tax lien under 26 U.S.C. § 6325.

On February 25, 1988, the property, now in the hands of the Freys, was levied upon to collect the outstanding federal tax lien. On April 22, 1988, the Freys filed this action for wrongful levy and injunctive relief.

DISCUSSION

Under 26 U.S.C. § 7426, a person must satisfy two requirements in order to successfully maintain an action for wrongful levy. First, the moving party must show that he has an interest in or a lien on the property, and second that the levy is wrongful. *Flores v. United States*, 551 F.2d 1169, 1171 (9th Cir. 1977). Regulations promulgated pursuant to 26 U.S.C. § 7426 specify that a levy is wrongful if "the levy is upon property in which the taxpayer had no interest at the time the lien arose or thereafter." Treas. Reg. section 301.7426-1(b).

The government bears the burden of establishing a nexus between the delinquent taxpayer and the property which is the subject of the complained of levy. *Flores*, 551 F.2d at 1176, n.8. The uncontroverted facts establish that plaintiffs succeeded to the taxpayers' title and that the Felicianos owned the property at the time the lien arose.

Plaintiffs contend that the release of the levy on March 12, 1987, was improper as it was not released to "facilitate the collection of the liability" under 26 U.S.C. § 6343(a), but rather, to attract a purchaser who would buy the property and pay off the senior liens, thus enabling the IRS to file a subsequent levy which would be entitled to seniority. The Court finds no such evidence of misconduct or bad faith on the part of the IRS. Thus, there is no basis for finding the IRS's subsequent levy on the property wrongful as a matter of law.

Plaintiffs assert that they are entitled to relief under general principles of equity because the government is seeking to gain an unfair and unjust advantage by levying on the property after they have purchased it and the senior liens have been paid off. Essentially, plaintiffs seek to estop the government from asserting its lien rights.

The federal government may not be estopped on the same terms as other litigants; in addition to the traditional requirements for estoppel, there must be a showing of "affirmative misconduct going beyond mere negligence." *Rider v. United States Postal Service,* 862 F.2d 239, 240 (9th Cir. 1988), *quoting Wagner v. Director Fed. Emergency Management Agency,* 847 F.2d 515, 519 (9th Cir. 1988).

In a case very similar to the one at bar, *Simon v. United States,* 756 F.2d 696 (9th Cir. 1985), the Ninth Circuit affirmed the district court's rejection of a claim of equitable estoppel. The Simons were purchasers of property at a county tax auction sale. *Id.* at 697. The county tax collector did not provide written notice of the sale to the Secretary of the Treasury as required by 26 U.S.C. § 7425(c)(1). *Id.* Thus, the property was sold without disturbing the federal tax lien. *Id.* The Simons' equitable estoppel claim was based on representations made to them by an IRS agent that "the worst that could happen to them if they purchased the property would be that the Government would exercise its right of redemption, and they would be reimbursed the purchase price." *Id.* at 698. The Simons argued that the IRS should be estopped from exercising its right of distraint and sale of the property, because the agent failed to inform them that the omission of notice to the IRS would result in the lien not being discharged. *Id.*

The court held that the agent's failure to inform the Simons of the notice requirement was not a sufficiently affirmative act to outweigh "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id., quoting Schweiker v. Hansen,* 450 U.S. 785, 788 (1981). The court further held that, as purchasers of property, the Simons were not innocent third parties, but rather, had a responsibility to ascertain the facts and legal requirements surrounding the sale.

Id. Finally, the court found that the government is not unjustly enriched where proceeds from the sale of property are applied towards satisfaction [*sic*] a legitimate federal tax lien. *Id.*

Similarly, the Freys have not come forward with any evidence of affirmative misconduct on the part of the IRS. Although Mrs. Feliciano has asserted that she believed that the lien was released, her belief appears only to have been based on the fact that the agents were friendly and appeared to feel sorry for her. The document signed by Mrs. Feliciano and Revenue Officer Bailey is clearly entitled "Release of Levy", it alone cannot justify a finding of misconduct. The Freys had a responsibility to ascertain the legal requirements for discharge of the federal tax lien.

The plaintiffs' reliance on *First American Title Insurance Co. v. United States,* 848 F.2d 969 (9th Cir. 1988), as a basis for general equitable relief, is misplaced. The *First American* court began by noting that as to priority issues, federal law and not state equitable principles apply. *Id.* at 972. Because the government perfected its lien before the plaintiffs purchased the property, the government's right, title, and interest in the property is, as a matter of federal law, superior to plaintiffs' interest.

Finally, plaintiff's claim of equitable subrogation must also fail. The prerequisites of equitable subrogation are: (1) payment must have been made by the subrogee to protect his own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must be one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others. *Simon,* 756 F.2d at 699, *quoting Caito v. United California Bank,* 20 Cal.3d 694, 144, Cal.Rptr. 751, 756 (1978).

The *Simon* court held that the plaintiffs were not subrogated to the rights of the Government because they failed to meet the first, second, and fourth requirements. *Id.* As the situation of the Freys is indistinguishable from that of the Simons on each of these requirements, the Court finds no grounds for deviating from the clear holding of *Simon*. Therefore, plaintiffs' claim of equitable subrogation must also fail.

Based on all of the above reasons, the Court hereby grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment. The defendant shall submit a proposed judgment for the Court's signature within ten days of the date of this order.

Dated April 10, 1989

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX C

FILED
APR 18 1989
Clerk, U.S. District Court
Central District Of California
By Deputy

ENTERED
APR 19 1989
Clerk, U.S. District Court
Central District Of California
By Deputy

ROBERT C. BONNER
United States Attorney
MASON C. LEWIS
Assistant United States Attorney
Chief, Tax Division
THOMAS D. COKER
Assistant United States Attorney
300 North Los Angeles Street
Room 2315
Los Angeles, California 90012
Telephone: (213) 894-2454

Attorneys for United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK T. FREY and
CHRISTINE L. FREY,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

CV 88-02260-JGD (Ex)
SUMMARY JUDGMENT

Defendant's Motion For Summary Judgment and Plaintiffs' Motion For Summary Judgment came on for hearing before the Court, the Honorable John G. Davies, United States District Judge, presiding.

In accordance with the Court's Order Granting Defendant's Motion For Summary Judgment And Denying Plaintiffs' Motion For Summary Judgment entered April 12, 1989, and in accordance with the Court's statement of facts therein, IT IS ORDERED AND ADJUDGED that:

1. A legitimate federal tax lien exists which encumbers the real property commonly known as 950 East Glen Drive, La Verne, California.

2. The federal tax lien has priority over plaintiffs' right, title and interest in the real property.

3. The levy upon the real property to collect the outstanding federal tax lien was not wrongful.

4. The United States may exercise its right of distraint and sale of the property pursuant to U.S.C. §§ 6331 and 6335.

5. The plaintiffs take nothing by their complaint, that their action is dismissed on the merits with prejudice, and each of the parties shall bear their own attorney fees and costs.

DATED: April 18 1989

JOHN G. DAVIES
United States District Judge
UNITED STATES DISTRICT JUDGE

Presented by:

ROBERT C. BONNER
United States Attorney
MASON C. LEWIS
Assistant United States Attorney
Chief, Tax Division

/s/ Thomas D. Coker
THOMAS D. COKER
Assistant United States Attorney

Attorneys for United States of America

CERTIFICATE OF SERVICE BY MAIL

I, ANGELA GREENE, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is United States Attorney, Tax Division, 300 North Los Angeles Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action; that I am employed by the United States Attorney for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, at whose discretion the service by mail described in this certificate was made; that on April 13, 1989, I deposited in the United States Mail at 300 North Los Angeles Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Summary Judgment

addressed to:

Rosemary Lemmis, Esq.
Levison & Lieberman
9401 Wilshire Blvd., Suite 1250
Beverly Hills, CA 90212

at her last-known address, at which place there is a delivery service by United States Mail.

This certificate is executed on April 13, 1989, at Los Angeles, California.

I certify, under penalty of perjury, that the foregoing is true and correct.

/s/ Angela Greene

(2)

No. 90-763

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK T. FREY and CHRISTINE L. FREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN
WILLIAM S. ESTABROOK
KEVIN M. BROWN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court below correctly determined that the United States did not release a federal tax lien on real property and that the petitioners purchased the property subject to the lien.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	5
Aquilino v. *United States*, 363 U.S. 509 (1960)	4
Fidelity Nat'l Title Ins. Co. v. *Department of the Treasury*, 907 F.2d 868 (9th Cir. 1990)	6-7
Little v. *United States*, 709 F.2d 517 (9th Cir. 1983)	7
Myers v. *United States*, 647 F.2d 591 (5th Cir. 1981)	7-8
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	5
Simon v. *United States*, 756 F.2d 696 (9th Cir. 1985)	7
United States v. *Bess*, 357 U.S. 51 (1958)	6
United States v. *Donahue Industries, Inc.*, 905 F.2d 1325 (9th Cir. 1990)	7
United States v. *Rodgers*, 461 U.S. 677 (1983)	6
United States v. *Snyder*, 149 U.S. 210 (1893)	6

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	5, 7
Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016	6
Internal Revenue Code of 1954 (26 U.S.C.):	
§ 6321	1, 6
§ 6322	6
§ 6323(a)	2, 6
§ 6323(i)(2)	5
§ 6331	7
§ 6331(a)	2
11 U.S.C. 362	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-763

MARK T. FREY and CHRISTINE L. FREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the order of the district court (Pet. App. B1-B7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. The petition for a writ of certiorari was filed on November 13, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the

amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

STATEMENT

1. On June 16, 1976, Alvin and Patricia Feliciano (the taxpayers) acquired title to certain real property (the Property) located in La Verne, California. On December 21, 1984, the United States lawfully assessed internal revenue taxes against taxpayers in the amount of $187,294.66. Pet. App. B2. Notice and demand for payment of these taxes were made as prescribed by law. On March 13, 1986, a Notice of Federal Tax Lien was filed with the Los Angeles County Recorder's Office. *Ibid.*

2. On May 8, 1986, the Internal Revenue Service (IRS) levied on the Property pursuant to Section 6331(a) of the Internal Revenue Code (26 U.S.C.) to collect income taxes and interest owed by taxpayers. On November 12, 1986, taxpayer Patricia Feliciano filed a Chapter 7 petition in the United States Bankruptcy Court for the Central District of California. Pet. App. B2. This filing automatically stayed any collection proceedings under the enforcement levy. 11 U.S.C. 362. The IRS did not receive actual notice of the filing of the petition until February 6, 1987. Pet. App. B2.

3. During February and March of 1987, two lienholders senior to the IRS moved for relief from the automatic stay to foreclose on the Property for defaults under deeds of trust totaling approximately

$80,000. There was also a third lien on the Property, senior to that of the IRS, in the amount of $14,000, recorded by the State of California. Pet. App. B2.

4. To avoid foreclosure, Ms. Feliciano placed the Property for sale. On February 23, 1987, an escrow was opened for the purchase of the Property by petitioners Mark T. Frey and Christine L. Frey. Petitioners had obtained a title report that disclosed the existence of the federal tax lien, and it was a condition of the sale that title to the property be delivered free of all monetary liens, including the federal tax lien. Pet. App. B3.

5. Because the filing of the petition in bankruptcy invoked the automatic stay provisions of 11 U.S.C. 362, on March 12, 1987, an Internal Revenue Agent executed a release of the enforcement levy on the Property. Ms. Feliciano has stated that she had the impression that this document released not only the enforcement levy but also the federal tax lien itself. The only basis she had for this belief, however, was that the agents were friendly and appeared sorry for her. Pet. App. B3, B6. But the document signed by the Revenue Agent "is clearly entitled 'Release of Levy.'" *Id.* at B6. Moreover, Ms. Feliciano does not assert that any IRS representative stated that the lien would also be released. *Ibid.*

6. Petitioners state that, following the execution of the Release of Levy, they were told by their real estate agent that the federal tax lien had also been removed from the Property. Indeed, the final title report prepared for the title insurer "failed to reflect the federal tax lien which was still of record." Pet. App. A3. On May 22, 1987, petitioners closed their purchase of the Property from the taxpayer. The proceeds of the sale were distributed to pay off

the senior mortgage lienholders and the lien of the State of California. The taxpayer received approximately $3,000 following disbursement to these three lienholders. The IRS was not notified of the sale, received none of the proceeds of the sale, and did not at any time issue a release of the federal tax lien on the Property. *Ibid.*

7. On October 22, 1987, the IRS discovered that the Property had been sold, and on February 22, 1988, the IRS levied upon the Property (now owned by petitioners) to collect the amount of the outstanding federal tax lien. Pet. App. A3. On April 22, 1988, the Freys filed a complaint in the United States District Court for the Central District of California, seeking a determination that they were entitled to a release of the federal tax lien on the Property. *Id.* at B3. The district court rejected the Freys' arguments and granted summary judgment to the United States. *Id.* at B7.

8. The Ninth Circuit affirmed. The court of appeals held that petitioners had failed to establish that the government had wrongfully levied upon the property, because the facts clearly established that petitioners bought the property subject to the federal tax lien. The court held that there was no basis for finding the United States to be estopped because of any conduct on the part of the Internal Revenue Service agents assigned to collection of the tax liability in question. Finally, the court, after examining California law (see, *e.g.*, *Aquilino* v. *United States*, 363 U.S. 509 (1960)), concluded that in the circumstances petitioners were not entitled to the benefits of equitable subrogation. Pet. App. A3-A6.

ARGUMENT

1. In the district court and in the court of appeals, petitioners asserted (i) that the United States is now estopped from levying on the Property due to the 1987 release of levy resulting from the automatic bankruptcy stay and (ii) that petitioners are subrogated to the positions of the senior lienholders whose liens were paid from the sale proceeds. The courts below correctly rejected these claims.[1] Pet. App. A4-A6, B4-B7.

Petitioners do not seek further review of these two issues that were addressed and decided below. Instead petitioners now seek to contend that, under the Internal Revenue Code and the Fifth Amendment to the United States Constitution, the federal tax lien extends only to the taxpayer's "equity" in the Property and not to her fee simple interest in the Property. These questions, however, were not addressed or decided below.[2] Review of these questions by this Court is thus unwarranted. *E.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

---

[1] The question of subrogation is a question of state law. Congress provided in Section 6323(i)(2) of the Code that "Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 * * *." Petitioners do not seek review of the lower court's determination that petitioners were not entitled to the benefits of subrogation under California law.

[2] Moreover, at least with respect to the constitutional claim, it does not appear that petitioners raised the issue in the courts below.

2. Section 6321 of the Internal Revenue Code provides that, if any person liable to pay any tax neglects or refuses to pay that tax after demand, the amount of the tax (including interest, additions, penalties or costs that may accrue) "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 6322 of the Code provides that the lien imposed by Section 6321 arises upon assessment of the tax and continues "until the liability * * * is satisfied or becomes unenforceable by reason of lapse of time." On the date of the sale of the Property to petitioners, the federal tax lien still encumbered the Property since the taxpayer had not satisfied the tax lien on or prior to that date. While Congress has provided that the federal tax lien is ineffective against a "purchaser" until notice of federal tax lien has been filed (Section 6323(a) of the Code),[3] the petitioners bought this property after notice of the federal tax lien assessed against the taxpayer had been recorded. Accordingly, the Property was transferred to the petitioners subject to the preexisting federal tax lien. See *United States* v. *Rodgers*, 461 U.S. 677, 691 n.16 (1983); *United States* v. *Bess*, 357 U.S. 51, 57 (1958).

In numerous similar cases, courts have concluded that the federal tax lien attaches to the taxpayer's fee simple interest in the real property in question and not simply to the "equity" retained by the taxpayer in that property. See *Fidelity Nat'l Title Ins.*

---

[3] The predecessor of Section 6323(a) was added by the Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016, after this Court held in *United States* v. *Snyder*, 149 U.S. 210 (1893), that the government's unfiled lien was good even against a subsequent good faith purchaser of the property.

Co. v. *Department of the Treasury*, 907 F.2d 868 (9th Cir. 1990); *Simon* v. *United States*, 756 F.2d 696 (9th Cir. 1985); *Little* v. *United States*, 709 F.2d 517 (9th Cir. 1983). The fact that the fee simple interest was encumbered by senior liens that were removed after the federal tax lien was filed does not alter the statutory scope of the lien, which extends to the taxpayer's entire interest in the property. As the court explained in *Fidelity Nat'l Title Ins. Co.*, 907 F.2d at 871:

> It is true that the IRS was placed in a better position after the * * * sale than it was in prior to the sale. * * * [But] the IRS did not obtain its lien through false means. It duly assessed taxes * * * and properly recorded its lien. Any potential purchaser would have been on notice regarding the IRS lien if that purchaser had performed a careful title search.

The lien against the Property remained valid until it was removed or extinguished. Since it was a lien against the Property itself, the government was entitled to seize and sell the Property even though title had passed to the petitioners. Section 6331 of the Code; *United States* v. *Donahue Industries, Inc.*, 905 F.2d 1325, 1330-1331 (9th Cir. 1990).

3. Nothing in this situation supports a claim of a violation of the Due Process Clause of the Constitution. While petitioners may have a remedy against the advisors who failed to detect and inform them of the continued, recorded existence of the federal tax lien, the failure of petitioners' advisors to do so cannot create a constitutional objection to enforcement of the lien by the United States. The Fifth Circuit, in rejecting a similar claim, held that no violation of Due Process was demonstrated where, as here, the

complaining party "was entitled to full judicial consideration, in an adversary context, of the validity of the levy" and, in such a proceeding, "was entitled to show that the liens had not properly attached to the property in question, that the liens had been discharged through foreclosure and sale of the property, that the liens had been discharged through payment of the tax assessed, that his own interest in the property was superior in rank to the federal tax liens, and that the government had failed to follow the procedural requirements" of the Internal Revenue Code dealing with federal tax liens and levies. *Myers* v. *United States*, 647 F.2d 591, 603 (1981). Petitioners offer no contrary authority. There is no conflict among the circuits or other basis for further review of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

GARY R. ALLEN
WILLIAM S. ESTABROOK
KEVIN M. BROWN
Attorneys

JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20295